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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

ROBERT B. BLALACK, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	}	No. 232.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes the petitioner, Robert B. Blalack, and presents this, his petition for rehearing in the above-styled cause, upon the grounds hereinafter specifically stated:

PRELIMINARY STATEMENT.

On October 14, 1946, this Court entered the following order in the cause:

The petition for writ of certiorari in this case is

denied. The Chief Justice took no part in the consideration or decision of this application.

In reaching its conclusion, this Court apparently overlooked two questions of general importance fairly raised by the petition for certiorari which have not been, but should be, determined by this Court and they will again be directed to its attention.

I.

The trial Judge, in overruling the motion for a directed verdict, and the Circuit Court of Appeals in sustaining his ruling, applied an erroneous test in determining the sufficiency of the circumstantial evidence to justify the submission of a case to the jury.

At page 15 of their brief, opposing the petition for certiorari, attorneys for the Government concede that there is a conflict in the circuits on the proposition above stated, saying:

"* * * But petitioner urges that the court below applied an erroneous test in determining the propriety of the trial judge's ruling; that it applied the substantial evidence rule rather than the rule, applicable to cases predicated on circumstantial evidence, that the evidence must exclude every reasonable hypothesis except that of guilt. Several circuits in reviewing rulings on a motion for directed verdict have stated the requirement as petitioner contends. See, e. g., **Leslie v. United States**, 43 F. 2d 288, 289-290 (C. C. A. 10). But these opinions are not in accord with decisions of this Court or with the historically proper treatment of the function and scope of a motion for directed verdict. Thus, in **Glasser v. United States**, 315 U. S. 60, this Court said (at p. 80):

"'It is not for us to weigh the evidence or to

> determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. **United States v. Manton**, 107 F. 2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances." **United States v. Manton**, supra. We are clear that, from the circumstances outlined above, the jury could infer the existence of a conspiracy and the participation of Roth in it.' "

As conceived by petitioner, the probative sufficiency of circumstances, not merely the weight they should be given, which is a question for the jury, is involved where the circumstances are as consistent with innocence as with guilt. Or, otherwise expressed, circumstances that may be reconciled with a reasonable theory of innocence do not constitute substantial evidence of guilt, and this is a question of law for the court.

Directly in point is the well-considered case of Isbell v. United States, 8th Circuit, 227 Fed. 788, 790, 793, from which we quote as follows:

> "If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt. Nor does the duty of the court to consider and determine whether or not there is substantial evidence of facts which exclude every other hypothesis but that of guilt require the court, in our opinion, to pass upon the weight of the evidence, the credibility of the witnesses, or to direct an acquittal unless he believes the defendant guilty beyond a reasonable doubt."

The rule, as thus stated in **Isbell v. United States**, supra, is sustained by the great weight of authority.[1]

The Circuit Court of Appeals for the Second Circuit has repudiated the rule established by the great weight of authority, including State decisions (see p. 34 of our brief in support of the petition for certiorari), and holds that the jury may make choice between an inference of guilt and an inference of innocence where either may reasonably be drawn from the same circumstances. **United States v. Picarelli**, 2nd Circuit, 148 F. 2d 997, 998. But this holding disregards the fundamental principle stated in **Isbell v. United States**, supra, that facts or circumstances consistent with innocence of the accused "are never evidence of his guilt."

The Glasser case, supra, though cited by the Government in its brief as being in conflict with the holding in **Leslie v. United States**, supra, and other cases in accord with the majority rule, does not reach the point under discussion and, in so claiming, the Government attorneys failed to make the proper distinction between a question involving the weight of the evidence, including the credibility of witnesses, with a question of its probative sufficiency. If the circumstances are as consistent with innocence as with guilt, they do not constitute substantial evidence of guilt and it is for the court, not the jury, to determine whether there is substantial evidence which fairly tends to support a verdict of guilty.

Apprehending that this Court may have been misled by the assertion at page 15 of the Government's brief that

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1 Yoffe v. U. S., 1st Cir., 153 F. 2d (Ad. Shts.) 570, 572, 573;
U. S. v. Russo, 3rd Cir., 123 F. 2d 420, 422;
Garst v. U. S., 4th Cir., 180 Fed. 339;
Kassin v. U. S., 5th Cir., 87 F. 2d 183-185;
Karchmar v. U. S., 7th Cir., 61 F. 2d 623;
Isbell v. U. S., 8th Cir., 227 Fed. 788, 790, 792, 793;
Fosse v. U. S., 9th Cir., 44 F. 2d 915, 918;
Leslie v. U. S., 10th Cir., 43 F. 2d 288, 289;
Sleight v. U. S., D. C. App., 82 F. 2d 459, 461;
Wharton on Criminal Evidence, 11th Ed., Vol. 2, Secs. 883, 922;
Jones on Evidence, 2nd Ed., Vol. 1, Sec. 12, p. 23.

the Glasser case, supra, is in conflict with the rule pronounced in Leslie v. United States, supra, and cases in accord, we have again brought the matter to its attention.

It is difficult to conceive a question of more importance in circumstantial evidence cases than the question of whether the rule that the evidence must exclude every rational hypothesis except guilt is a mere admonition to the jury or a rule that should be applied by the courts in determining the probative sufficiency of the evidence to support a verdict. Yet, that point, on which there is conflict between the decisions of the Second Circuit and those of a majority of the circuits, has not been adjudicated by this Court.

II.

According to both the prevailing opinion and the dissenting opinion of this court in Thomas Paper Stock Company et al. v. Porter, Admr. (66 S. Ct., Adv. Sheets 884, 888), the Taft Amendment had its origin in the Congressional view that the Price Administrator in regulations theretofore promulgated had "exceeded the limitations expressed in section 2 (h)" of the 1942 Price Control Act.

In the majority opinion, Mr. Justice Frankfurter says:

> "The legislation (Taft Amendment) was too specifically directed against prior unauthorized regulations, promulgated no doubt with the best of motives in the great effort against inflation, for us to give it a meaning other than that which the language in the context of its history yields."

Mr. Justice Black in the dissenting opinion, concurred in by Mr. Justice Douglas and Mr. Justice Murphy, says:

> "What then was the purpose of Congress in enact-

ing the Taft Amendment? The Managers on the part of the House thus stated the Section's purpose in the Conference Report on the Amendment: It 'is to meet the objection that the Price Administrator has exceeded **the limitations expressed** in section 2 (h) of * * * (the 1942 Price Control Act) * * * in issuing certain regulations already promulgated.' (Emphasis supplied.) Section 2 (h) provides: 'The powers granted * * * shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, **except to prevent circumvention or evasion of any regulation, order, price schedule, or requirements under this Act.**' (Emphasis supplied.) As the Conference Report indicates, the Taft Amendment actually added little new, if anything at all, to the requirements already contained in Section 2 (h)."

It is clear of doubt that according to the Congressional view, any regulation requiring the grade labeling of commodities was not only unauthorized by the Price Control Act of 1942, but exceeded the limitations of Section 2 (h) of that Act, and this court substantially so held in the Thomas Paper Stock Company case. The Taft Amendment, designed to emphasize the Congressional intent and to strike down any such regulation theretofore promulgated, was specifically directed against acts of the Price Administrator because he was the official who had issued the offending regulations. But the operation of Section 2 of the Price Control Act was not restricted to the Price Administrator and the limitations of that section remained in full force and effect after the Price Control Act had been amended by the Stabilization Act of 1942, and could not be suspended in whole or in part even by the President (U. S. C., Title 50, Appendix, Sec. 962).

So we have a situation where, according to the Congressional view as interpreted by this court (Thomas Paper

Stock Company et al. v. Porter, Admr.), any regulation, requiring the grade labeling of commodities, exceeded the limitations of Section 2 (h) of the Price Control Act, limitations not modified by the Stabilization Act, and where such a regulation, theretofore promulgated by the Price Administrator, was invalidated by the Taft Amendment.

Prior to the adoption of the Taft Amendment, the Price Administrator had issued a regulation requiring that beef and veal carcasses be graded and grade labeled (Revised Maximum Price Regulation No. 169).

OES Regulation No. I, issued August 5, 1943, this being twenty days subsequent to the adoption of the Taft Amendment, incorporated by reference the grade requirements of Revised Maximum Price Regulation No. 169, and delegated to the Price Administrator the duty of enforcing that regulation as it provided for the grading and grade labeling of meats (Directive 184, 8 F. R. 12669).

In Issuing OES Regulation No. I and Directive 184, the Economic Stabilization Director restored the identical situation which Congress intended to prevent by Section 2 (h) of the Price Control Act, and to correct by the Taft Amendment. It is entirely immaterial that the Economic Stabilization Director acted from the best motives and had no purpose of evading, circumventing or nullifying an act of Congress or disregarding the legislative intent, but the fact remains that OES Regulation No. I for all practical purposes continued in full force and effect, a regulation which, according to the view of Congress, exceeded the limitations of Section 2 (h) of the Price Control Act and which, according to the opinion of this Court, was actually invalidated by the Taft Amendment.

A regulation having this effect should not be sanctioned by the Courts. At any rate, the conviction of petitioner under a regulation that Congress apparently intended to exclude from the area in which regulations might be

adopted, would seem to present a question of such importance as to justify its consideration and determination by this Court.

Wherefore, petitioner prays that the court reconsider the several grounds urged in the petition for certiorari but particularly the points presented in this petition, and that upon such reconsideration the Writ of Certiorari be granted as prayed for in the petition and the case set for hearing on the merits.

Respectfully submitted,

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